International Securities and Capital Markets*

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There have been many developments in securities and capital markets regulations in 2009. Several changes were prompted in response to the unprecedented global financial crisis, with continuing regulatory overhaul in many nations designed to avoid a repeat of similar events. Other changes facilitate cross-border enforcement across several jurisdictions or harmonize securities regulations in Europe and other regions. The following article summarizes selected changes announced or implemented this year in regulation of international securities and capital markets in Brazil, Belgium, Canada, Germany, Luxembourg, the Netherlands, New Zealand, Switzerland, Turkey, and the United States.

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I. Developments in Brazil*

A. Memorandum of Understanding between Brazilian and Cayman Regulators

Considering increasing international activity in securities and derivatives markets, in February 2009, the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários*–CVM)[1] and the Cayman Islands Monetary Authority (CIMA)[2] signed a Memorandum of Understanding for mutual assistance and information exchange in enforcing and securing compliance with their respective laws.[3]

This is the second agreement between CIMA and a Brazilian Government entity. On March 7, 2006, CIMA and the Central Bank of Brazil (*Banco Central do Brasil–Bacen*), which supervises and regulates financial institutions in Brazil, signed a similar MoU for information exchange for co-operation and consultation to enforce and secure compliance with laws relating to CIMA's and Bacen's functions and duties in their respective jurisdictions.[4]

B. Brazilian Distributorship Companies granted same status as Brokerage House Companies

On March 2, 2009, Bacen and CVM issued Joint-Decision No. 17, authorizing distributorship companies (*sociedades distribuidoras de títulos e valores mobiliários*) to operate directly in environments and systems of negotiation of securities of the Stock Exchanges, thereby granting them the same operational treatment and status as brokerage house companies.[5]

This measure was adopted because, prior to demutualization of the Brazilian Stock Exchange in 2007, only brokerage house companies (*sociedades corretoras*) could exclusively perform their activities directly in such environments and systems of negotiation of securities.

After demutualization, which converted the Brazilian Stock Exchange into a profit corporation with shares traded in the securities market, access to its environments and systems was no longer related to ownership.

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1. Established in December 1976, CVM is an independent federal agency linked to the Ministry of Finance, responsible for regulating and supervising securities markets. CVM's authority extends over international cooperation in its field, including establishing bilateral relations.

2. Established by the Monetary Authority Law 1999, CIMA's responsibilities include currency management, regulation and supervision of financial services (including securities and investments business, banking, insurance and fiduciary services), advice to Government and cooperation with overseas regulatory authorities.

3. *See* Extract, CVM assina memorando de entendimento com Autoridade Monetária das Ilhas Cayman (CIMA), DIÁRIO OFICIAL DA UNIÃO-DOU [Brazilian Official Gazette of the Union] (Mar. 6, 2009), *available at* http://www.cvm.gov.br/port/infos/CVM_memorando_IlhasCayman.asp.

4. *See* Memorandum of Understanding Regarding the Exchange of Information for Co-operation and Consultation, Cayman Is Monetary Authority-Banco Central de Braz., Mar. 7, 2006, DOU (Mar. 6, 2009), *available at* http://www.cimoney.com.ky/uploadedFiles/Regulatory_Framework/International/MOUBCDB.pdf.

5. *See* Decisão-Conjunta BACEN/CVM 17 [Joint Decision No. 17] DOU de 02.03.2009 (Brazil), *available at* http://www.cvm.gov.br/Port/Atos/DecCon/Bccvm17.asp.

C. CVM's position on "Poison Pills"

On June 23, 2009, CVM's Board approved Opinion (*Parecer de Orientação*) No. 36, regarding statutory provisions imposing encumbrance(s) on shareholders who vote in favor of eliminating share dispersion protection clause in company's bylaws[6], referred to by such names as "poison pills" or "shareholder rights plans."

Recently, several Brazilian companies amended their bylaws to include share dispersion protection clauses to force any investor who acquires a certain percentage of its outstanding shares to make a public offer to purchase all remaining shares.[7] Furthermore, some of these bylaws contain an accessory clause imposing a substantial burden on shareholders voting to eliminate such obligation to make a public offer.

These accessory clauses are provisions that cannot be modified or eliminated at the discretion of the beneficiaries (shareholders) or at the request of third parties (potential purchasers).

CVM understands that mandatory application of accessory clauses is incompatible with several principles under Law No. 6.404, of December 15, 1976, as amended (the Brazilian Corporate Law–BCL), particularly articles 115, 121, 122, I, and 129, and issued the Opinion clarifying that CVM will not apply any penalties in administrative proceedings to shareholders who, in compliance with BCL, vote to suppress or amend the share dispersion protection clause, regardless of making a public offer under the accessory clause.[8]

II. Developments in Belgium*

A new version of the Belgian Corporate Governance Code was published on March 12, 2009.[9] It replaces the 2004 version of the Code and continues to be based on the "comply or explain" approach. The main amendments concern corporate social responsibility,[10] balance within the leadership of a company,[11] functioning and evaluation of the board,[12] respective role of the board and the executive management,[13] fair and responsible remuneration,[14] and dialogue with shareholders and investors.[15]

Since January 8, 2009, Belgian listed companies and regulated financial institutions must set up audit committees.[16] On May 26, 2009, the Belgian Banking, Finance, and

6. *See* Parecer de Orientação CVM No. 34 [Opinion Guidance CVM No. 34], DOU de 18 de agosto de 2006 (Brazil), *available at* http://www.cvm.gov.br/asp/cvmwww/atos/exiato.asp?File=/pare/pare034.htm.

7. *See, e.g.*, BM&F Bovespa, Corporate Bylaws, (Embraer, Natura, Dasa and Tecnisa, *available at* http://www.bmfbovespa.com.br/en-us/download/Corporate%20Bylaws.pdf (last visited Feb. 20, 2010).

8. *See* Lei No. 6.404, de 15 dezembro de 1976, DOU de 17.12.1976, *available at* htpp://www.planalto.gov.br.

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9. *See* Belgian Code on Corporate Governance, March 12, 2009, *available at* http://www.corporategovernancecommittee.be/en/corporate_governance_code/final_code/.

10. *See id.* princ. 1.2.

11. *See id.* princs. 1.2, 2.1, 2.3, 2.4, 4.7.

12. *See id.* princs. 1.3, 2.8, 2.9, 3.7, 4.7, 4.11, 5.2, 5.3, 5.4.

13. *See id.* princs.1.3, 1.6, 6.5, 6.6.

14. *See id.* princs.7.2 to 7.6, 7.8, 7.9, 7.12, 7.14, 7.15, 7.17, 7.18.

15. *See id.* princs.1.7, 4.15, 8, 8.2, 8.5, 8.9, 8.11.

16. *See* Act of Dec. 17, 2008 on the establishment of an audit committee in listed companies and financial institutions, Belgian State Gazette [BSG], Dec. 29, 2008, 3d ed., p.68568, which completed the implementa-

Insurance Commission (the CBFA) issued a communication regarding its policy on exemptions to this obligation: exemptions are available for subsidiaries of regulated financial institutions if an audit committee that meets the Belgian or equivalent EU requirements exists at group level.

On September 25, 2009, the Belgian Federal Government approved a draft bill aiming at reinforcing the corporate governance of Belgian listed companies,[17] which provides for three key measures: (i) the requirement to include in the annual report a statement on corporate governance; (ii) the obligation to set up a remuneration committee (which will, *inter alia*, have to draw up a report on remuneration) and (iii) the allocation of various responsibilities to the shareholders meeting with respect to remuneration of executive directors.

During the summer 2009, the CBFA held a consultation on a draft legislation implementing the Shareholders' Rights Directive,[18] which was supposed to be implemented into national legislation by August 3, 2009. The timing for implementation, however, is still unclear because to date no bill to implement the Directive in Belgian law has been submitted to Parliament.

III. Developments in Canada*

In 2009, a number of significant changes occurred in the regulation of public issuers in Canada. These include the landmark decision in *BCE Inc. v. 1976 Debentureholders*, and the introduction by the Toronto Stock Exchange (TSX) of new buy-side shareholder approval requirements addressing the rights of shareholders in mergers and acquisitions transactions.[19]

A. Canadian Directors' Fiduciary Duties: Not limited to maximizing shareholder value

In one of the last major private equity transactions announced prior to the market meltdown, *BCE's* $52 billion leveraged buy-out was opposed by debenture holders that argued that the proposed transaction was unfair and oppressive to their interests.[20] In contrast to Delaware law, where the duty to maximize shareholder value on a change of control transaction is clear,[21] the Supreme Court of Canada ruled that the directors' fiduciary duty is owed at all times to the corporation, and not exclusively to the shareholders. In considering the best interests of the corporation, the directors are entitled to look at other constituencies, including creditors, employees, consumers, government, and the en-

tion into Belgian law of Directive 2006/43/EC of May 17, 2006 on statutory audits of annual accounts and consolidated accounts, O.J.E.U, June 9, 2006, L 157/87.

17. The draft bill is unpublished. For a summary, *see* Communiqué de presse du Conseil des ministres (Fr.) (Nov. 7, 2008), *available at* http://www.residencepalace.be/archive/20081107/eb69c1caf2f67cf0ab4a59fe8d2b6703/?lang=fr.

18. *See* 14 July 2007 O.J.E.U., (L 184) 17 [hereinafter Directive].

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19. *See* BCE Inc. v. 1976 Debentureholders, [2008] 3 S.C.R. 560 (Can.).

20. *Id.* at 22.

21. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

vironment.[22] Moreover, the fiduciary duty is a "broad, contextual concept. It is not confined to short-term profit or share value."[23] The court ruled that the board of directors had considered the contractual rights of the debenture-holders and under the business judgment rule were entitled to deference and to proceed with the transaction notwithstanding the adverse effect on the debenture-holders' interests.[24] While the decision has introduced some uncertainty as to directors' obligations in change of control transactions, it is expected that shareholder interests will continue to be the primary focus of directors in such transactions.

B. New Buy-Side Shareholder Approval Requirements

For over twenty years, TSX issuers could generally issue shares for acquisitions of public companies without shareholder approval, regardless of the number of shares issued. This practice ended abruptly with the Ontario Securities Commission (OSC) intervention in HudBay Minerals and Lundin Mining Corporation.[25] In November 2008, HudBay agreed to acquire Lundin Mining through an all-stock arrangement that would have resulted in just over 100% dilution to HudBay.[26] One of HudBay's shareholders, who bought after the announcement of the transaction, appealed the TSX's decision not to require shareholder approval to the OSC.[27]

In 2009, the OSC overturned the TSX's decision because it considered the level of dilution to be extreme and concluded that permitting the transaction to proceed without shareholder approval would undermine the quality of the TSX marketplace and be contrary to public interest.[28]

As a result, effective November 24, 2009, the TSX established a rule requiring listed issuers to obtain buy-side shareholder approval for public company acquisitions that would result in the issuance of twenty-five percent or more of the issued and outstanding shares of an acquiror on a non-diluted basis.[29] This new rule will bring the TSX's rules into line with those of many other major exchanges. In response, TSX issuers can be expected to use equity financings to generate cash as an alternative to using stock directly as an acquisition currency.

C. TSX Scrutiny of Public Offerings

Another major development in 2009 was the TSX's enhanced scrutiny of public offerings which has led the TSX to intervene in the setting of pricing and other transaction terms that were otherwise agreed to by issuers.

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22. BCE Inc., 3 S.C.R. 560 at 38.

23. *Id.*

24. *Id.* at 104.

25. *See* HudBay Minerals Inc., 32 O.S.C.B. 3733, 58 B.L.R. (4th) 249 (OSC) (2009), *available at* http://www.osc.gov.on.ca/en/Proceedings_rad_20090428_hudbay.htm.

26. *Id.* at 41.

27. *Id.* at 2.

28. *Id.* at 45.

29. *See* TSX Inc. Notice, Approval of Amendments to the Rules of the Toronto Stock Exchange to Introduce Undisclosed and Discretionary Orders, 32 OSCB 7746 (2009), *available at* http://www.osc.gov.on.ca/documents/en/Marketplaces/xrr-tse_20090925_approve-undisclosed.pdf.

OPTI Canada Inc. (OPTI) announced an over-night marketed offering of shares that was priced at a discount of more than twenty percent to the company's five-day volume weighted average price.[30] In what was then considered to be an unusual exercise of its discretion following the announcement of a public offering, the TSX refused to approve the offering without shareholder approval.[31] OPTI was eventually successful in completing its public offering, but only after a lengthy trading halt on the TSX followed by a significant drop in the trading price of OPTI's common shares.[32] The TSX has indicated that it will consider intervening where the offering price for a prospectus offering is at what it believes to be an excessive discount to the market price, as well as where directors, officers, and significant shareholders are to receive a benefit in connection with the offering (such as preferential allocation) or where the offering is not widely distributed.[33]

IV. Developments in Germany*

A. Impaired Securities

Germany experienced an intense debate on how the financial system should deal with impaired structured securities. Eventually, the Federal Parliament adopted legislation allowing for the creation of individual "bad banks," which took effect on July 17, 2009.[34]

The German "bad banks" concept comprises two principal schemes. The first is a scheme (SPV Scheme) involving a transfer of impaired structured securities from a financial institution to an institute-specific special purpose vehicle (SPV) in exchange for a bond guaranteed by the governmental rescue fund (SoFFin).[35] The second is a scheme (Consolidation Scheme) under which risk positions or non-strategic business divisions of a financial institution may be transferred with legal or economic effect to a public law liquidation sub-agency (*Anstalt in der Anstalt*) formed on an institute-specific basis by and under the umbrella of the governmental Financial Market Stabilization Agency (FMSA).[36] While the SPV Scheme is particularly, but not exclusively, designed for private sector financial institutions, the Consolidation Scheme is expected to be used primarily by public sector banks (*Landesbanken* and *Sparkassen*). Participation in the schemes is voluntary.

Furthermore, the deadline for SoFFin to make available the majority of the other existing financial market stabilization measures, including the popular guarantee for new bank debt, has been extended by one year to December 31, 2010.[37] As an additional measure to strengthen the regulatory capital base of German banks, the Ministry of Fi-

30. News Release, CNW Group, OPTI Canada, Inc., OPTI Provides Update on Equity Offering (June 25, 2009), http://www.newswire.ca/en/releases/archive/June2009/25/c2036.html.

31. *Id.*

32. *Id.*

33. *See* TSX Group, Inc., Toronto Stock Exchange Company Manual § 606(b) (2007), *available at* http://tmx.complinet.com/file_store/pdf/rulebooks/TSX-CM_Jun1V1_07.pdf.

* By Dr. Hartmut Krause.

34. Gesetz zur Fortentwicklung der Finanzmarktstabilisierung [FMStFG], July 17, 2009, BGBl I at 1980, amending Finanzmarktstabilisierungsfondsgesetz of Oct. 17, 2008, *available at* http://www.gesetze-im-internet.de/bundesrecht/finstfg/gesamt.pdf (F.R.G.) [hereinafter FMStFG].

35. *See* FmStFg § 6(a), as amended.

36. *See id.* § 8(a), as amended.

37. *See id.* § 6(1)(1), as amended.

nance decreed that losses on certain financial assets shall not be deducted from the regulatory capital.[38]

B. The New Bond Act

On August 5, 2009, the new German Bond Act became effective.[39] The new legislation replaces the German Bond Act of 1899, which did not achieve significant relevance and was widely seen to be in need of reform.

The new German Bond Act provides new flexibility by allowing for amendments to terms and conditions of German law-governed notes by way of majority resolution if and to the extent this is contemplated therein.[40] The restrictions on the use of majority resolutions contained in the Bond Act of 1899 have been lifted, including the restrictions on amendments to terms and conditions absent a crisis of the issuer of the notes.

The new Bond Act contains a statutory principle of transparency that compels the issuer to ensure that the terms and conditions will be understood by the investors targeted.[41] The Bond Act does not, however, finally settle whether terms and conditions of notes may qualify as standard contract terms subject to the rules of judicial review of standard contract terms.

The new Bond Act may also be applied to notes that were issued prior to the implementation of the Bond Act, provided a qualified majority of the holders so resolve, and the issuer consents.[42]

Finally, the procedural rules applicable to meetings of note-holders have been modernized.[43]

V. Developments in Luxembourg*

The law of May 29, 2009, requires that every credit institution whose securities are admitted to trading on a regulated market must include in its management report a declaration on corporate governance.[44] Such declaration shall indicate the applicable code of governance. The code shall outline measures taken regarding the control and the management of risks, the main powers of the general meeting, and the rights of shareholders.

38. *See* Verordnung über die Ermittlung der Eigenmittelausstattung von Institutsgruppen und Finanzholding-Gruppen bei Verwendung von Konzernabschlüssen und Zwischenabschlüssen auf Konzernebene [Konzernabschlussüberleitungsverordnung-KonÜV] § 2(3), Feb. 12, 2007, BGBl I at 150, as amended on July 22, 2009, BGBl I at 2126 (F.R.G).

39. *See* Gesetz zur Neuregelung der Rechtsverhältnisse bei Schuldverschreibungen aus Gesamtemissionen und zur verbesserten Durchsetzbarkeit von Ansprüchen von Anlegern aus Falschberatung [SchVG], July 31, 2009, BGBl I at 2512, *available at* http://www.gesetze-im-internet.de/bundesrecht/schvg/gesamt.pdf (F.R.G) [hereinafter SchVG].

40. *See id.* § 5.

41. *See id.* § 3.

42. *See id.* § 24(2).

43. *See id.* § 9.

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44. *See* Law of May 29, 2009, Luxembourg Memorial n 133, June 12, 2009, p.1882 (implementing Directive 2006/46/CE).

The Luxembourg Stock Exchange has also revised its ten principles of governance.[45] The new rules apply to Luxembourg companies, the shares of which are listed on a regulated market operated by the Luxembourg Stock Exchange.[46] They shall draw up a corporate governance Charter published on the companies' websites and publish a governance Chapter in their annual reports.[47]

The board of directors shall *inter alia* establish rules of professional ethics, ensure the appointment of a compliance officer, and establish an audit committee assisting on financial reporting, internal control, and risk management.[48] Rules to determine the remuneration of the board must be transparent and precise but no individual remuneration disclosure has been set in the code.[49]

The company shall ensure equal treatment of the shareholders and the board of directors shall ensure that the rights of the minority and majority shareholders are respected.[50] This could be important, keeping in mind that the Court of Justice of the European Union has recently judged that there is no general principle of community law of equality of shareholders,[51] and that the Shareholders' Rights Directive[52] has not been implemented in Luxembourg yet.

VI. Developments in the Netherlands*

As a result of the economic crisis and several transactions, such as the takeover resulting in the split up of ABN AMRO Bank, regulation of the financial market and corporate governance have been high on the political agenda during the last year. Historically, many in the Netherlands have been proponents of the stakeholders' model, whereby the company is seen as a long-term alliance between all the related parties. A number of Dutch politicians and the Monitoring Committee Corporate Governance have now voiced concerns that shareholders with a short-term view (could potentially) exercise too much control over Dutch companies. A fairly new element in this discussion is the notion of "corporate social responsibility."

The revised Corporate Governance Code addresses a few of these matters, in the first place for companies whose shares or depository receipts for shares have been admitted to a stock exchange.[53] This Code needs to be complied with in accordance with the "comply or explain principle." The most important changes in this Code relate to management board remuneration, shareholders' responsibility, diversity in the supervisory board, inter-

45. *See* BOURSE DE LUXEMBOURG, CORPORATE GOVERNANCE: THE TEN PRINCIPLES OF CORPORATE GOVERNANCE OF THE LUXEMBOURG STOCK EXCHANGE (2009), *available at* http://www.bourse.lu/application?_flowId=PageStatiqueFlow&content=services/CorporateGovernance.jsp#.

46. *Id.* at 7.

47. *Id.* at 13.

48. *Id.* at 14-15.

49. *Id.* at 23.

50. *Id.* at 28.

51. *See* 2009 O.J. (C 297) 7-8, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:297:0007:0008:EN:PDF.

52. *See* Directive, *supra* note 18.

* By Petra Zijp.

53. *See* CORPORATE GOVERNANCE CODE MONITORING COMMITTEE, CORPORATE GOVERNANCE CODE 5 (2008), http://www.corpgov.nl/page/downloads/DEC_2008_UK_Code_DEF__uk_.pdf.

nal risk management, and the duty to consider the relevant social responsibility aspects of the company's business practices.[54]

In addition, in July, legislation was proposed[55] to lower the threshold for disclosure of control in listed corporations, to introduce an obligation for shareholders to disclose their intentions, to create the possibility of identifying investors, and to change the threshold for the right to put an item on the agenda. The main purpose of these propositions is to keep the Netherlands corporate governance system attractive and possibly to make it more attractive internationally.

Furthermore, the Minister of Justice has published a consultation document[56] wherein he proposes to limit the access of shareholders to the legal procedure whereby an inquiry into company affairs may be requested and proposes to provide Dutch companies themselves with the right to institute an inquiry.

VII. Developments in New Zealand*

2009 has not seen sweeping changes to New Zealand's securities law landscape. Rather, it has been a year of incremental changes particularly aimed at harmonization between New Zealand and Australia, and at reducing the cost of raising capital, particularly for listed issuers who are already subject to the continuous disclosure regime, while at the same time ensuring protections for both "mum and dad" investors and the financial system as a whole.

On April 3, 2009, NZX enacted changes to both the NZSX and NZAX Listing Rules.[57] The changes make it quicker to raise capital from existing shareholders[58] and increase the flexibility to make placements.[59]

July saw the enactment of the Securities (Disclosure) Amendment Act 2009.[60] The key change brought about by this Act, and the subsequent Securities Regulations 2009 (which came into force on October 1, 2009), is that issuers who are subject to a continuous disclo-

54. *Id.* at 3-4, 7.

55. *See* Tweede Kamer der Staten-Generaal, vergaderjaar 2008–2009, 32 014, nr. 2, *available at* http://static.ikregeer.nl/pdf/KST133855.pdf.

56. *See* Aanpassing Criteria Enquêterecht Voor Aandeelhouder Grote NV en BV, Nieuwsbericht (Oct. 29, 2009), http://www.justitie.nl/actueel/nieuwsberichten/archief-2009/91029aanpassing-criteria-enqueterecht-voor-aandeelhouder-grote-nv-en-bv.aspx?cp=34&cs=578.

* By David Quigg, John Horner, Matt Yates and Asha Stewart.

57. *See* NZSX/NZDX, Listing Rules, http://www.nzx.com/market-supervision/rules/nzsx-and-nzdx-listing-rules (last visited Feb. 10, 2010); NZAX, Listing Rules, http://www.nzx.com/market-supervision/rules/nzax-listing-rules (last visited Feb. 10, 2010).

58. *See* NZSX/NZDX Listing Rule 7.10 (Feb. 3, 2009), http://static.nzx.stuff.co.nz/legacy/NZSX_Rules.pdf; NSAX Listing Rule 7.9, http://www.legislation.govt.nz/act/public/2009/0023/latest/DLM1827104.html.

59. *See* NZSX/NZDX Listing Rule 7.3.5 (Feb. 3, 2009); NSAX Listing Rule 7.3.5 (increasing the limit on placements without shareholder approval by five percent of a class of equity securities in a twelve month period).

60. *See* Securities (Disclosure) Amendment Act 2009, 2009 S.N.Z. No. 23, *available at* http://www.legislation.govt.nz/act/public/2009/0023/latest/whole.html#dlm1827104.

sure regime are now allowed to prepare a simplified form of prospectus that omits information previously disclosed.[61]

The Government is moving ahead with the full implementation of the Financial Advisers Act of 2008. This Act, which is intended to be fully in force by the end of 2010,[62] places minimum competence standards on financial advisers[63] and improves the quality and relevance of the disclosure that financial advisers are required to give to clients.[64]

October saw the enactment of the Anti-Money Laundering and Countering Financing of Terrorism Act of 2009.[65] This Act aims to bring New Zealand into line with international standards in this area.[66] Though regulations do not yet state the precise requirements under the Act, financial sector participants should be aware that there may be obligations under this Act going forward.

VIII. Developments in Switzerland*

The most important capital markets development in the past year has been the revision of SIX Swiss Exchange listing regulations, which entered into force on July 1, 2009.[67] The revisions primarily adjust the regulations to changes in legal practice, streamline the regulations and make them more user-friendly, and are intended to approach harmonized compliance with corresponding European legislation.

Under previous regulations, the listing prospectus could be published in German, French, Italian, or English.[68] Now all documents to be filed or published can be submitted in English.[69] This rule change should facilitate the filing of listing applications, which had to be in German or French prior to July 1, 2009, and the publication of listing notices, which had to be in German, French, or Italian prior to July 1, 2009.[70]

The listing procedure became more flexible under the new regulations. Under the new regulations, subject to certain conditions, listing prospectuses of equity securities can be in two parts if the issue price or issue volume is not known when submitting the listing prospectus.[71] The supplement to the first part must be published in the same way as the

61. *See* Securities Act 1978 § 2, 1978 S.N.Z. No. 103, *available at* http://www.legislation.govt.nz/act/public/1978/0103/latest/DLM26800.html (inserting definition for "simplified disclosure prospectus"); *id.* § 10 (setting out substance of new regime).

62. *See* Press Release, Simon Power, Minister of Commerce, Govt. Addressing Concerns Over Financial Advisors (Nov. 5, 2009), *available at* http://www.beehive.govt.nz/release/govt+addressing+concerns+over+financial+advisers.

63. *See* Financial Advisers Act 2008 §§ 33, 37, 46, 2008 S.N.Z No. 91, *available at* http://www.legislation.govt.nz/act/public/2008/0091/24.0/DLM1584202.html.

64. *See id.*, pt. 2.

65. Anti-Money Laundering and Countering Financing of Terrorism Act 2009, 2009 S.N.Z. No. 35, *available at* http://www.legislation.govt.nz/act/public/2009/0035/35.0/DLM2140720.html.

66. *See* Press Release, Simon Power, Minister of Commerce, Parliament Passes Law on Money Laundering (Oct. 15, 2009), *available at* http://www.beehive.govt.nz/release/parliament¶asses+law̄oney+laundering.

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67. SWX Swiss Exchange Listing Rules, art. 114 (July 1, 2009), *available at* http://www.six-exchange-regulation.com/admission_manual/03_01-LR/en/index.html.

68. *Id.* art 8.

69. *Id.*

70. *Id.*

71. *Id.* art 28.

listing prospectus once the omitted information becomes known, which, in any case, must be done no later than the first day of trading.[72] These two parts then constitute the final listing prospectus.[73] The two-part prospectus permits an issuer to place equity securities more quickly than under the old regulations.[74]

"Incorporation by reference" may now be used more often.[75] Information may be incorporated into the listing prospectus through a comprehensive or partial reference to previously or simultaneously published documents, including interim financial statements, auditor reports, specific documents, listing prospectuses not older than twelve months, and other information sent to securities holders. Incorporated documents are subject to prior approval by the Regulatory Board of the SIX Swiss Exchange contemporaneously with approving the listing prospectus. The use of incorporation by reference triggers a duty to update if the documents referenced are no longer current, but the duty to update can alternatively be fulfilled by indicating that outdated information is not current in the listing prospectus.[76]

Under the new regulations the listing prospectus can be published on the issuer's webpage. Investors may request a printed (but not bound) version, however, free of charge. SIX Swiss Exchange plans to establish an online archive of listing prospectuses.[77]

The Schemes regulating disclosure of information in a listing prospectus have also been amended. Certain information, including intra-management business activity, is no longer subject to disclosure. Other information, including risk factors and criminal history of the management and directors (except listing prospectuses for bonds and derivatives) must be disclosed.[78]

The old regulations did not require publishing listing notices for debt and derivative securities. Equity securities still require a listing notice. These listing notices for all types of securities may be published electronically in English, French, Italian, or German.[79]

SIX Swiss Exchange now requires equity securities issuers to establish a calendar on their webpages at the beginning of every financial year showing important corporate events.[80]

Sanctions may now be imposed if an issuer, guarantor, or recognized representative breaches, or does not ensure compliance with, the listing regulations.[81]

Regulatory Board decisions can now be appealed to the Appeals Board within twenty trading days of publication.[82]

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72. *Id.* art 29.

73. *Id.*

74. *Id.* art. 29.

75. *Id.* art 35.

76. *Id.*

77. *Id.* art. 30.

78. *Id.* art. 28, scheme A ch. 2.2.1.

79. *Id.* art. 8.

80. *Id.* art. 52.

81. *Id.* art. 60.

82. *Id.* art. 62.

IX. Developments in Turkey*

In 2009, Turkey saw both reactive and proactive regulatory developments in the securities market. Reactive regulations were introduced to minimize the effects of the global financial crisis, whereas their proactive counterparts were geared towards the goal of turning Istanbul into a financial center. These regulations pave the way to the alignment of Turkey's securities markets with those of developed countries.

Among the regulations enacted in response to the financial crisis, the rules on disclosure of material events have undergone extensive revision.[83] Considering the latest developments in the financial markets, the importance of continuous disclosure has become clearer. The new regulations require that listed companies post disclosures on their websites, at the latest by the day after a material event disclosure is made, and that companies keep their records for five years.[84] Listed companies are also expected to release a reporting policy that includes details of the types of information to be disclosed other than those listed in the regulations and the frequency and method of disclosure.

Another remarkable regulation authorizes listed investment trusts and intermediary institutions to acquire their own shares up to the level of twenty percent of the paid-in or issued capital.[85] Companies whose shares are thinly-traded on the Istanbul Stock Exchange (ISE) have been suffering lately from price fluctuations and manipulation risks, and the regulation allows those companies to defend themselves from manipulation attempts by acting as a market maker for their own shares, thereby stabilizing their share prices.

To address the liquidity concerns of the listed companies, the Capital Markets Board of Turkey (CMB) increased the issuance limits in the regulation governing non-voting shares,[86] so that companies can now issue up to the level of paid-up or issued capital. The previous limit had been only seventy-five percent thereof. The CMB also streamlined its regulations regarding debt instruments.[87] Most importantly, the minimum maturity terms for bonds and convertible bonds have been reduced to half, and the seven-year maximum maturity limit has been canceled.[88]

In order to make Istanbul a financial center, the Turkish Government adopted the Strategy Document,[89] in which the CMB features as the key institution that is working towards diversifying securities market products. Regulations concerning warrants[90] and

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* By Hergüner, Bilgen & Özeke.

83. *See* Sermaye Piyasasi Mevzuat [Capital Markets Board of Turkey] No. 271333, OFFICIAL GAZETTE, Feb. 6, 2009, *available at* http://www.spk.gov.tr/apps/teblig/displayteblig.aspx?id=354&ct=f&action=displayfile&ext=.pdf.

84. *Id.* art. 22(5)

85. *See* Weekly Bulletin, Haktalik Bülten (No. 2009/39) (Sept. 4, 2009), http://www.spk.gov.tr/apps/haftalikbulten/displaybulten.aspx?yil=2009&sayi=39&ext=.pdf#page=3.

86. *See* Sermaye Piyasasi Mevzuat [Capital Market Board of Turkey] No. 27117, OFFICIAL GAZETTE, Jan. 21, 2009, *available at* www.spk.gov/tr/mevzuat/mezvuat_index.html.

87. *Id.* at serial II, no. 22.

88. *Id.*

89. *See* Kurul Karari [Committees Decision of Turkey] No. 27364, OFFICIAL GAZETTE, Oct. 2, 2009, *available at* http://rega.basbakanlik.gov.tr/eskiler/2009/10/20091002-9.htm.

90. *See* Sermaye Piyasasi Mevzuat [Capital Market Board of Turkey] No. 27117, OFFICIAL GAZETTE, Jan. 21, 2009, *available at* http://www.spk.gov.tr/mevzuat/mevzuat_index.html.

asset-covered securities[91] have been promulgated this year. Also, a draft regulation creating an Islamic finance product such as the *Sukuk ijara* certificate, a security backed by a stream of income received through lease contracts, has been announced.[92] Another draft regulation concerns derivative instruments intermediation.[93] Considering the volume of derivative trading on a global scale, the CMB decided to regulate brokerage services regarding derivative products in a new regulation separate from other brokerage services. The comprehensive Action Plan envisions 2015 as the deadline for completion of the necessary infrastructure, and for making Istanbul an international financial center.

In short, 2009 was a year of investments by the CMB in regulatory improvements. It remains to be seen whether these investments will bear fruits in 2010.

X. Developments in the United States

A. DEBT MARKETS*

The United States' debt markets were greatly impacted by the passage of the American Recovery and Reinvestment Act of 2009.[94] Of note to international observers is the introduction of the "Build America Bonds" program.[95] Under this program, governmental issuers may designate their securities as taxable tax credit or taxable subsidy securities.[96] The tax credit option provides tax credits to registered owners of governmental securities.[97] Under the subsidy option, instead of providing tax credits, the federal government makes recurring subsidy payments to issuers in the amount of thirty-five or forty-five percent of the issuers' interest payments.[98] These subsidy payments provide the equivalent of tax-exempt interest rates to issuers while the securities can be traded in taxable markets. Build America Bonds are designed to expand the market for government debt and appeal to investors of taxable securities, such as foreign investors and pension funds, which have no incentives to hold tax-exempt securities.[99]

Debt markets were also affected by changes in disclosure rules. Of particular note is an amendment to Rule 15c2-12(b)(5) of the Securities and Exchange Act of 1934, that provides for an EDGAR-style online repository for municipal securities called the Electronic Municipal Market Access (EMMA) system. Underwriters of municipal securities are now required to ensure that all continuing disclosures by "obligated persons" be accomplished

91. *See* Sermaye Piyasasi Mevzuat [Capital Market Board of Turkey] No. 27347, OFFICIAL GAZETTE, Sept. 12, 2009, *available at* http://www.spk.gov.tr/apps/teblig/displayteblig.aspx?id=366&ct=f&action=displayfile&ext=.pdf.

92. Capital Market Board of Turkey, Leases Certificates & the Leasing Companies (Oct. 23, 2009).

93. Capital Market Board of Turkey, Intermediary Activities in Derivative Instruments Trading (Sept. 19, 2009), http://www.spk.gov.tr/displayfile.aspx?action=displayfile&pageid=584&fn=584.pdf.

* By Matthias M. Edrich.

94. Am. Recovery & Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 2009.

95. *Id.* § 1531.

96. The Build America Bonds program is not restricted to bonds. Other securities such as leases and certificates of participation may qualify. *See* IRS Notice 2009-26 (2009); IRS Notice 2009-1 (2009).

97. IRS Notice 2009-26.

98. *Id.* The forty-five percent subsidy option is available for Recovery Zone Economic Development Bonds, which are a type of Build America Bond. *See* I.R.S. Notice 2009-50, 2009-1 (2009).

99. Press Release, US Dep't of the Treasury, Treasury Releases Build Am. Bonds Update (July 20, 2009), *available at* http://www.ustreas.gov/press/releases/tg221.htm.

using EMMA.[100] Disclosure documents stored to EMMA, including offering statements, material event notices, and period disclosure releases, are accessible at no charge to the public in full length for the life of the related securities.[101]

B. OTC Derivatives Regulation*

The global economic crisis has led to many proposals for regulatory reform. Although the over-the-counter (OTC) derivatives markets held up comparatively well during the crisis, these large but generally unregulated markets have been blamed, at least in part, for the downfall of Lehman Brothers, the upheaval at AIG, and the amplification of other adverse market events. Whether fair or not, the crisis has led to calls for overhaul of the OTC derivatives markets and comprehensive regulation of these markets for the first time.

In June 2009, the Obama Administration released a White Paper proposing an overhaul of the U.S. financial regulatory system, including a new regulatory regime for OTC derivatives,[102] and in August 2009, the U.S. Department of the Treasury proposed draft legislation (the Treasury Proposal) to implement the proposals made in the White Paper.[103] Since then, the House has passed a bill entitled the "Wall Street Reform and Consumer Protection Act," which includes the "Derivative Markets Transparency and Accountability Act of 2009" as Title III thereof and a discussion draft of OTC derivatives legislation has been introduced in the Senate.[104] Both the Treasury Proposal and the proposed legislation being contemplated by Congress constitute a repudiation of many of the OTC derivatives exemptions and exclusions created by the Commodity Futures Modernization Act of 2000 and provide for comprehensive regulation of OTC derivative transactions, market participants, and dealers for the first time.[105]

Each of the proposals would create new requirements for OTC derivatives with respect to clearing and exchange-trading; reporting non-cleared OTC derivatives; registration and regulation of dealers and end-users–most notably through capital and margin requirements; reporting and transparency requirements; and position limits on OTC derivatives.[106] The House bill and the Dodd draft would also amend the definition of "security" in both the Securities Act of 1933 and the Securities Exchange Act of 1934. In addition, the Dodd draft, unlike the House bill, would grant the Securities and Exchange Commission (the SEC) the authority to adopt regulations that would extend beneficial ownership requirements (and therefore the "short-swing" profit rules of Section 16 of the Securities

100. Amendment to Municipal Security Disclosure, Exchange Act Release No. 34-59062 (Dec. 5, 2008).
101. *See id.*
* By Michael S. Sackheim, Nathan A. Howell, James R. McDaniel, Elizabeth M. Schubert, Madeleine J. Dowling, Ellen P. Pesch, Xiaowen Qiu, Giselle M. Barth and Sheetal Khera. Current as of December 31, 2009 and based on publicly available information.
102. *See* U.S. Dep't of the Treas., Fin. Regulatory Reform–A New Foundation: Rebuilding Fin. Supervision & Regulation (June 17, 2009), *available at* http://www.financialstability.gov/docs/regs/FinalReport_web.pdf.
103. U.S. Dep't of the Treasury, Improvements to Regulation of Over-the-Counter Derivatives Mkt. (2009).
104. *See* U.S. Dep't of the Treas., Improvements to Regulation of Over-the-Counter Derivatives Mkt. (2009); Title III, Derivative Markets Transparency and Accountability Act of 2009, of the Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (1st Sess. 2009).
105. H.R. 4173.
106. H.R. 4173.

Exchange Act of 1934) to include equity securities underlying security-based swaps and other derivatives.

While the proposals are similar in many respects, they diverge as to which OTC derivatives must be cleared and traded as well as which end-users would be subject to registration and regulation. Some of the proposals also differ as to whether OTC derivatives dealers and major OTC end-users would be precluded from owning, directly or indirectly, more than twenty percent of the voting authority for any derivatives clearing organization or swap execution facility and the extent to which the SEC and Commodity Futures Trading Commission would have the ability to exempt entities from the new requirements of the legislation. Additionally, unlike the Treasury Proposal or the Dodd draft, the House bill provides that unless explicitly authorized by an act of Congress, no provision of the legislation should be construed to authorize federal assistance to support clearing operations or liquidation of a derivatives clearing organization.

It is almost certain that comprehensive OTC derivatives regulation will require much of the OTC market to move to centralized clearing and that exchange trading for the current OTC derivatives market will be implemented in the United States in the near future.

C. Other Developments*

Several other developments affected U.S. capital markets in 2009, a few of which are summarized below.

In February, the SEC extended to April 20, 2009, the deadline for comments on its Roadmap for U.S. Issuers' use of International Financial Reporting Standards (IFRS),[107] which was proposed in November 2008[108] and set forth milestones that, if achieved, could lead to required use of IFRS by U.S. issuers by 2014. The SEC issued a statement reaffirming its support for a single set of global accounting standards in February 2010, yet refrained from establishing a firm timeline for incorporating such standards into the U.S. financial reporting system. The statement encourages current efforts for convergence of U.S. GAAP and IFRS and directs SEC staff to execute a work plan on the potential adoption of IFRS for U.S. public companies. Assuming certain milestones are met, the SEC states it will determine in 2011 whether to transition to IFRS, and indicates that if that will be the case, the first time U.S. issuers would be required to report under the new system would be approximately 2015 or 2016.[109]

In April, the SEC proposed rules reflecting two approaches to restrictions on short selling. One is a price test that would apply on a market-wide and permanent basis, utilizing an "uptick rule" relating to the last sale price or an "alternative uptick rule" referencing the current national best bid.[110] The other is an approach that would apply only to

* By Dorothee Fischer-Appelt.

107. Roadmap for the Potential Use of Fin. Statements Prepared in Accordance with Int'l Fin. Reporting Standards by US Issuers, Exchange Act Release Nos. 33-9005, 34-59350 (Feb. 3, 2009).

108. Roadmap for the Potential Use of Fin. Statements Prepared in Accordance with Int'l Fin. Reporting Standards by US Issuers, Exchange Act Release Nos. 33-8982, 34-58960 (Nov. 14, 2008).

109. *See* "Commission Statement in Support of Convergence and Global Accounting Standards", Release Nos. 33-9109; 34-61578 (Feb. 24, 2010).

110. Amendments to Regulation SHO, Exchange Act Release No. 34-59748 (Apr. 10, 2009). The release was adopted in modified form on Feb. 26, 2010 (Exchange Act Release No. 34-61595).

particular securities during severe market declines in those securities, utilizing a "circuit breaker" triggered by a ten percent intra-day decline.[111]

In December, the SEC adopted new compensation and corporate governance disclosure requirements.[112] The rules require SEC-registered companies, *inter alia*, to disclose overall compensation policies and practices for employees and their impact on risk-taking, to the extent they are reasonably likely to have a material adverse effect on the company, to expand disclosure of director and nominee qualifications, including the consideration of diversity in the nomination process, and to disclose a company's leadership structure and why it believes it is the best structure. This includes, for example, explanations of why, or why not, the roles of CEO and board chairman are combined or separate, as well as the board's role in the risk management process.

In 2008, the SEC had proposed a set of comprehensive reforms to regulate conflicts of interests, disclosures, internal policies, and business practices of credit rating agencies. A number of these proposals were adopted, others were re-opened for comment, and other changes were proposed in the course of 2009. For example, in September 2009, the SEC published a concept release on a rule change that would make "nationally recognized statistical rating organizations" (NRSROs) liable as "experts" for ratings disclosures in public securities offerings.[113] Currently, they are exempted from liability but not other credit rating agencies. Further, in October 2009, the SEC proposed amendments that would require issuers to disclose credit ratings if those ratings are used in connection with SEC-registered offerings.[114] In addition, rules were proposed in November 2009[115] that would impose additional requirements on ratings agencies to furnish an annual compliance report, to disclose additional information about sources of revenues, and to make publicly available a consolidated report containing information about revenues of the NRSRO attributable to persons paying for a credit rating. In November, the SEC also announced that it is deferring consideration of action with respect to a proposed rule that would have required disclosure of how the credit ratings procedures for structured finance products differ from those of other types of rated instruments, or the use of distinct ratings symbols for structured finance products. Finally, in November the SEC also adopted a rule amendments that require additional disclosure and conflict of interest requirements on NRSROs in order to address concerns about the integrity of the credit rating process and methodologies used.[116]

111. *Id.*

112. Proxy Disclosure Enhancements, Exchange Act Release Nos. 33-9089, 34-61175 (Dec. 16, 2009).

113. Concept Release on Possible Rescission of Rule 436(g) Under the Securities Act of 1933, Exchange Act Release Nos. 33-9071, 34-60798, IC-28943 (Oct. 7, 2009).

114. Credit Ratings Disclosure, Exchange Act Release Nos. 33-9070; 34-60797; IC-28942 (Oct. 7, 2009).

115. Proposed Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 34-61051 (Nov. 23, 2009).

116. Amendments to Rules for Nationally Recognized Statistical Rating Organizations, Exchange Act Release No. 34-61050 (Nov. 23, 2009).